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MEMORANDUM TO MUNICIPAL CLIENTS

To: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: Open Meeting Law – Approval of Contracts in Executive Session

This is the second in a four-part series on the revised Open Meeting Law. As you know, the new law took effect on July 1, 2010 and consolidated enforcement authority in the Attorney General. Although the Attorney General has issued regulations, including regulations authorizing remote participation under certain circumstances, the Attorney General, through the Division of Open Government (the "Division") has in most respects interpreted the application of the law through the issuance of decision on complaints filed with that office. Each of these decisions includes important information, and the next Memorandum in this series will address several such decisions.

This Memorandum will review a public body's responsibilities under exemption (2) of the Open Meeting Law, which allows a public body to enter executive session to strategize concerning, and conduct, negotiations with non-union personnel. G.L. c.30A, §21(a)(2). In general, municipalities have understood this exemption to allow a public body to meet in executive session to negotiate and agree to terms of a contract or contract amendment. Where the Open Meeting Law does not, by its terms, require a public body to validate, ratify or otherwise announce decisions it has made in executive session, such a requirement has not typically been understood to be part of a public body's duties under the law.

Importantly, however, in AG-OML-2011-56, the Division states, "the scope of the purpose is limited to the discussions, negotiations, and deliberations that occur prior to a vote on a contract." [emphasis added]. As is commonly known, however, agreement on contract terms is, in fact, the essence of contract negotiations. Moreover, one could argue that agreeing to terms, regardless of where a vote ensues, creates a contract. Until the Division's position is challenged in a court of competent jurisdiction, however, the Division's position will be applicable to all contract negotiations with non-union personnel undertaken by public bodies.

The Division offers two potential strategies for approving contracts, stating, "The Board should have reconvened in open session to approve or ratify the contract terms agreed to in the executive session." Thus, public bodies may agree to terms in the executive session, but not approve (execute) the contract as a whole until it meets in open session. In the alternative, a public body may approve the contract "subject to" a vote in open session to ratify the same.

Further, although AG-OML-2011-56 does not explicitly apply to negotiations with collective bargaining units, it is reasonable to anticipate that the Division will take a similar position. In such cases, a procedure similar to the above may be used to approve or ratify contracts or contract terms agreed to in executive session. However, except with respect to school
department contracts, such agreements do not become binding on the municipality until the cost items of the first year of the collective bargaining agreement are funded by the legislative body.

It is therefore critical that members of public bodies responsible for negotiating these matters understand the implications of voting differently in open session than they did in executive session. Because of the case law concerning the elements of a contract, if the body agrees to terms in executive session and then fails to approve the same in open session, it may nevertheless be possible for the entity with whom the body is negotiating to bring an action in contract against the municipality. Similarly, changes in positions taken in open and executive sessions concerning the same collective bargaining agreement could expose the municipality to charges of bad faith bargaining or an unfair labor practice. Clearly, the decision in AG-OML-2011-56 is significant, and public bodies should address the manner in which such negotiations are going to be handled prior to such negotiations so as to make clear to the parties involved the process that will be used.

We will, of course, inform you if future decisions of the Division clarify or change the conclusions in this Memorandum.

Very truly yours,

Lauren F. Goldberg

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